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IN THE  
**Supreme Court of the United States**

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October Term, 1940

No. **555**

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THE TEXAS COMPANY, a Delaware corporation,  
*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

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**PETITION FOR A WRIT OF CEPTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.**

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*To The Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

The petitioner, The Texas Company, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Fifth Circuit entered in this cause on July 15, 1940, denying the petition of The Texas Company to set aside a decision and order of the National Labor Relations Board, dated November 17, 1939.

**Opinions Below**

The opinion of the Circuit Court of Appeals (Transcript of Record pp. 597-598) is reported in 112 F. (2d) 744. The decision and order of the National Labor Relations Board (Transcript of Record pp. 454-486J) are reported as 17 N.L.R.B. No. 73.

### **Jurisdiction**

The decree of the Circuit Court of Appeals (Transcript of Record pp. 600-602) was entered July 15, 1940. A petition for rehearing (Transcript of Record pp. 603-608) was denied on August 7, 1940 (Transcript of Record p. 609). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, and under Section 10(e) and (f) of the National Labor Relations Act.

### **Statute Involved**

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C., Supp. V, Sec. 151 et seq.) are set forth in the appendix to this petition (infra p. 14).

### **Summary of Proceedings Below**

On April 22, 1938, the Oil Workers International Union filed certain amended charges (Transcript of Record pp. 10-14) with the Board, pursuant to which the Board, on May 4, 1938, issued a complaint (Transcript of Record pp. 15-25) alleging that the petitioner had engaged in certain unfair labor practices at its refineries at Galena Park and Port Neches, Texas. Petitioner filed its answer (Transcript of Record pp. 46-147) and hearings were held. The Trial Examiner filed two Intermediate Reports (Transcript of Record pp. 160-178 and 289-309), to each of which petitioner filed exceptions (Transcript of Record pp. 191-288 and 311-380). An oral argument was had (Transcript of Record pp. 407-453), and on November 17, 1939, the Board issued its decision and order (Transcript of Record pp. 454-486J), finding that:

1. Petitioner had dominated and interfered with the formation and administration of The Employee



Representation Plan at both refineries (Transcript of Record pp. 470-1).

2. Petitioner had dominated and interfered with the formation and administration of The Employees Brotherhood at its Port Neches refinery (Transcript of Record p. 486F).

3. Petitioner had interfered with, restrained, and coerced the employees at its Port Neches refinery in the exercise of their rights guaranteed in Section 7 of the Act (Transcript of Record p. 486).

4. Petitioner had *not* dominated or interfered with the labor organization at its Galena Park refinery known as "The Houston Works Employees Federation of The Texas Company" (Transcript of Record p. 480).

The Board ordered petitioner (1) to cease and desist from dominating and interfering with the Plan at both refineries and the Brotherhood at the Port Neches refinery, (2) to cease and desist from otherwise interfering with, restraining, or coercing its employees, and (3) to disestablish the Brotherhood; but dismissed the complaint in so far as it related to the Federation at the Galena Park refinery (Transcript of Record, pp. 486 I-J).

On November 25, 1939, petitioner filed in the United States Circuit Court of Appeals for the Fifth Circuit a petition (Transcript of Record pp. 509-567) to review and set aside the said order. On June 19, 1940, the Circuit Court of Appeals handed down its opinion (Transcript of Record pp. 597-598) refusing to set aside the said order, and on July 15, 1940, issued the decree (Transcript of Record pp. 600-602) which petitioner now seeks to have reviewed. A petition for rehearing (Transcript of Record pp. 603-608) was filed by petitioner on August 3, 1940, and was denied on August 7, 1940 (Transcript of Record p. 609).

### Questions Presented

1. Whether the Court's decree and the Board's order abridge freedom of speech in violation of the First Amendment to the Constitution of the United States.
2. Whether there was substantial evidence to support the Board's conclusion that petitioner interfered with, restrained, and coerced its employees at its Port Neches refinery.
3. Whether there was substantial evidence to support the Board's conclusion that petitioner dominated or contributed support to The Employees Brotherhood at petitioner's Port Neches refinery.
4. Whether the Board properly ordered petitioner to cease and desist from dominating the Employee Representation Plan.

### Statement

Petitioner is engaged in the oil business and operates a number of refineries, among which are its refineries at Port Neches and Galena Park, Texas.

In July 1933 petitioner prepared an Employee Representation Plan which was adopted by petitioner and the employees at its Port Neches and Galena Park refineries. Prior to this time no labor organization had asserted the right to bargain collectively for the employees at these refineries. Nearly a year later the complaining Union first asserted such a right at these refineries. Thereafter petitioner bargained collectively with representatives of both the Union and the Plan until the spring of 1937.

In March 1936 petitioner and the complaining Union had a ten-day bargaining meeting at Chicago and agreed upon Working Rules, which were signed by petitioner and expressly recognized the right of the Union to bargain for its members. These Rules were also agreed to by the employee representatives under the Plan and were put into effect at the Port Neches refinery on April 9, 1936.

In March 1937 the Union and petitioner agreed to discuss a revision of the Working Rules, but, as the Union was not able to do so until May, petitioner, with the Union's acquiescence, began a series of meetings with the Plan representatives for the purpose of first discussing such a revision with them. One of these meetings was held with the Port Neches employes on April 24-26, 1937. The Board found that certain statements made by petitioner's representatives at this meeting and certain other statements by alleged representatives of petitioner in 1937, constituted interference, restraint and coercion (Transcript of Record, pp. 481-6).

After April 1937 petitioner had no meetings with the Plan representatives at the Port Neches refinery, and after June 1937 none were had at the Galena Park refinery. The Board found that the Plan was "defunct" at both places and had "ceased to function" (Transcript of Record, pp. 470-1), but nevertheless held that petitioner had dominated the Plan and ordered petitioner to cease doing so (Transcript of Record, pp. 471, 486I).

In the spring of 1937 a new labor organization (The Employes Brotherhood) was formed by the employes at the Port Neches refinery and it is this organization as to which the Board also found domination and interference (Transcript of Record pp. 486-486F). About this time the employes at Galena Park also formed a new labor organization (The Houston Works Employes Federation) and it is this organization as to which the Board dismissed the complaint. (Transcript of Record, pp. 471-480, 486J).

### **Argument**

#### **1. Alleged Interference, Restraint, and Coercion**

The findings upon which the Board concluded that petitioner had interfered with, restrained, and coerced its em-

ployes relate to statements made by petitioner's representatives at a meeting with certain of the employes of the Port Neches refinery on April 24-26, 1937, and to three conversations in 1937 between employes and certain persons found by the Board to be representatives of petitioner. The express findings of the Board are set forth in its decision under the caption "C. Interference, restraint, and coercion at Port Neches Works" (Transcript of Record pp. 481-486).

Petitioner submits that the said findings, on their face, do not constitute substantial evidence supporting the Board's conclusion that petitioner interfered with, restrained, and coerced its employes in violation of the Act. The statements mentioned were a proper exercise of the right of petitioner's representatives to freedom of speech.

*Texas & New Orleans R. R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 568, 50 Sup. Ct. 427, 433;

*Jefferson Electric Company v. National Labor Relations Board* (7th Circuit), 102 F. 2d 949, 956;

*Midland Steel Products Co. v. National Labor Relations Board* (6th Circuit), 113 F. 2d 800, 804;

*National Labor Relations Board v. Asheville Hosiery Co.* (4th Circuit), 108 F. 2d 288;

*National Labor Relations Board v. Ford Motor Company* (6th Circuit), Decided October 8, 1940; 7 L. R. R. 163, 166-7-8 (not yet officially reported);

*National Labor Relations Board v. Union Pacific Stages* (9th Circuit), 99 F. 2d 153, 178.

There was no evidence, and the Board made no findings, as to how the statements found by the Board actually interfered with, restrained, or coerced any of the employes in the exercise of their rights under the Act. On the contrary, the Trial Examiner found that "the local management was on several occasions instructed by the general management and its officials that employees had a perfect right to join any organization of their choosing. Such instructions had been periodical down to the time of the hearing and trans-

mitted on down to local supervisory officials and foremen. Employees were also so instructed" (Transcript of Record pp. 165-6). He also found that petitioner "very fully established that it was very much concerned over its employees, that they should know their rights under the National Labor Relations Act \* \* \*" (Transcript of Record p. 173). It was also undisputed that petitioner made a practice of telling each new employee that he was free to join any labor organization of his own choosing (Appendix to Petitioner's Brief p. 292).

The Board's findings as to what occurred at the meeting of April 24-26, 1937 are in many respects unsupported by the stenographic record of the said meetings (Appendix to Petitioner's Brief pp. 82-275). Reference is made particularly to paragraphs 3 and 4 of the Board's findings under the said caption (Transcript of Record pp. 481-2).

An understanding of the purposes of the meeting of April 24-26, 1937, requires some knowledge of the circumstances leading up to the meeting, which the Board ignored. These circumstances are briefly outlined in the Statement above (pp. 4-5).

## 2. Alleged Domination of the Brotherhood

The Board's findings respecting the organization of The Employees Brotherhood at the Port Neches refinery are set forth in the Board's decision under the caption "D. Domination of the Brotherhood" (Transcript of Record pp. 486-486F).

Briefly, the findings by which the Board connects petitioner with the formation of the Brotherhood are as follows: The Port Neches superintendent at a Plan Council meeting on April 30, 1937, announced that the management representatives were withdrawing from the Plan and indicated that the Council was at liberty to increase its membership if it so desired. Three one-time employee

representatives of the Plan Council subsequently became representatives of the Brotherhood. One of the employe organizers of the Brotherhood was the son of the construction foreman, another was "in charge" of trucks, and a third was "chief" shipping clerk. The first organization meeting was held at the home of a company engineer. One of the employe organizers, in the company of a "subforeman", visited an independent union at another oil company. Ballot boxes owned by petitioner were taken from petitioner's storehouse and used in two Brotherhood elections. These elections were conducted on petitioner's premises and, though the employment supervisor and the superintendent observed them, they did nothing to prevent them. Employes conducting the election took time cards from the rack for the purpose of assisting in soliciting votes. A foreman observed the solicitation of votes in his department and did nothing about it. Employes solicited membership in the Brotherhood on petitioner's time. When the complaining Union asked for exclusive bargaining rights in April 1938, petitioner suggested an election between the Union and the Brotherhood.

At the most, such findings indicate simply a passive attitude on the part of petitioner toward the Brotherhood. Petitioner submits that, on their face, they do not constitute substantial evidence supporting the Board's conclusion that petitioner dominated and interfered with the formation of the Brotherhood in violation of the Act.

*Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 197, 229; 59 Sup. Ct. 206, 217;

*National Labor Relations Board v. Columbian Co.*, 306 U. S. 292, 299-300, 59 Sup. Ct. 501, 505;

*Ballston-Stillwater Knitting Co. Inc. v. National Labor Relations Board* (2nd Circuit), 98 F. 2d 758, 761-2-3;

*Cupples Co. Manufacturers v. National Labor Relations Board* (8th Circuit), 106 F. 2d 100, 114-116;

*L. Greif & Bro., Inc. v. National Labor Relations Board* (4th Circuit), 108 F. 2d 551, 557-558;

*National Labor Relations Board v. Mathieson Alkali Works* (4th Circuit), Decided October 7, 1940; 7 L. R. R. 169, 170-2 (not yet officially reported);

*National Labor Relations Board v. Sterling Electric Motors* (9th Circuit), 109 F. 2d 194, 201-210;

*National Labor Relations Board v. Swank Products, Inc.* (3rd Circuit), 108 F. 2d 872, 874-5.

Furthermore, the Board virtually ignores the following clearly established facts which completely nullify all the significance attributed by the Board to its findings: Bigler, Jr., the son of the general construction foreman mentioned in the Board's findings, was formerly a member of the Union, and his father had nothing to do with his activities in organizing the Brotherhood (Appendix to Petitioner's Brief pp. 308-9, 341-2, 354). Mabey, the employe found by the Board to be "in charge" of trucks, was an hourly employe and his duties were to wash and otherwise maintain the trucks (Appendix to Petitioner's Brief pp. 384, 391). He initiated the organization of the Brotherhood (Appendix to Petitioner's Brief p. 390). Kofahl, found by the Board to be the "chief" shipping clerk, was simply "a" shipping clerk and reported to the chief clerk (Appendix to Petitioner's Brief p. 366; Record of Proceedings p.1326). Hunt, the company engineer at whose apartment the first organizational meeting was held, had nothing to do with the meeting (Appendix to Petitioner's Brief p. 378). The "subforeman" who accompanied one of the Brotherhood's organizers to visit the union of another company, was not a supervisor and does not appear on Board's Exhibit 28 listing supervisory employes. Only three of the eleven ballot boxes used in the Brotherhood's elections were taken



from petitioner's storehouse, and these were taken without permission; the remaining eight boxes were constructed by the employes at home (Appendix to Petitioner's Brief pp. 369, 387-8). The elections were only partly conducted on petitioner's premises and this was in violation of instructions (Appendix to Petitioner's Brief pp. 351, 382). The elections and other organizational activities of the Brotherhood were conducted by the employes on their own time (Appendix to Petitioner's Brief p. 351). The expenses of organizing the Brotherhood were borne solely by the employes and its printing was done by an outside printer (Appendix to Petitioner's Brief pp. 338, 368). The Brotherhood was the result of a merger of two employe labor organizations, one of which was organized by Kofahl and other employes who had previously been connected with the Plan and the other of which was organized by Mabey, Bigler, Jr., and other employes who had had no connection whatsoever with the Plan (Appendix to Petitioner's Brief pp. 354, 390). Only three of the eleven Brotherhood representatives had formerly been connected with the Plan (Transcript of Record p. 486D). There was evidence that one employe had on two occasions solicited membership for the Brotherhood on petitioner's time and once on his own time (Record of Proceedings pp. 1203-6, 1223-5), but the complaining Union also solicited memberships on petitioner's time and premises on a number of occasions (Record of Proceedings pp. 1287, 1294-5, 1441-5, 1519-20). Other labor organizations were also permitted the use of petitioner's property (Record of Proceedings pp. 1302-3, 1324, 1375, 1131, 1371-2).

### 3. Alleged Domination of the Plan

A substantial part of the Board's findings of fact is devoted to the Employe Representation Plan (Transcript of Record pp. 465-471), which it concluded was "defunct" and had had no meetings at Port Neches for more than a



year, and at Galena Park for nearly a year, prior to the issuance of the complaint (Transcript of Record, p. 470).

For its present purposes, petitioner is not questioning that, in the light of the decisions of the courts since the discontinuance of the Plan, petitioner did technically dominate and contribute support to the Plan prior to the decision of this court establishing the constitutionality of the Act.

However, the Plan was prepared and offered to petitioner's employees more than a year before any other labor organization had asserted the right to bargain collectively at either Port Neches or Galena Park, and more than two years prior to the passage of the National Labor Relations Act. After the passage of the Act, petitioner promptly instructed its supervisors and informed its employees of their respective obligations and rights under the Act (Transcript of Record pp. 173, 203-4, 469), and, during the period (1935-1937) when the constitutionality of the Act was in the course of being determined by the courts, the Plan was continued in effect. After the constitutionality of the Act had been established, petitioner abandoned the Plan even though it had not yet been established that such Plans were illegal and a Regional Director of the Board had assured petitioner that such action was not necessary (Appendix to Petitioner's Brief pp. 400-1; Transcript of Record p. 471).

It is difficult, therefore, to see what useful purpose is served, or on what basis it is justifiable, to order petitioner to discontinue the Plan at Port Neches or Galena Park.

### **Reason for Allowing the Writ**

1. The question of how far the National Labor Relations Board can go in exercising the powers given to it under the National Labor Relations Act without abridging the right of an employer and his representatives to freedom of speech under the First Amendment to the Consti-

tution of the United States is an important question of law which has never been determined by this Court. It is submitted that the Board's order of November 17, 1939, and the Court's decree of July 15, 1940, exceeds the limitation of the said Amendment.

2. The said order and decree conflicts with the following decisions of other circuits of the United States Circuit Court of Appeal on the question of freedom of speech and on the question of what constitutes substantial evidence of interference, restraint, or coercion of employes in violation of Section 8(1) of the National Labor Relations Act:

*Jefferson Electric Company v. National Labor Relations Board* (7th Circuit), 102 F. 2d 949, 956;  
*Midland Steel Products Co. v. National Labor Relations Board* (6th Circuit), 113 F. 2d 800, 804;  
*National Labor Relations Board v. Asheville Hosiery Co.* (4th Circuit), 108 F. 2d 288;  
*National Labor Relations Board v. Ford Motor Company* (6th Circuit), Decided October 8, 1940, 7 L. R. R. 163, 167-8 (not yet officially reported);  
*National Labor Relations Board v. Union Pacific Stages* (9th Circuit), 99 F. 2d 153, 178.

3. The said order and decree conflicts with the following decisions of other circuits of the United States Circuit Court of Appeal on what constitutes substantial evidence of domination and interference with the formation and administration of a labor organization and contributing support thereto in violation of Section 8(2) of the National Labor Relations Act:

*Ballston-Stillwater Knitting Co. Inc. v. National Labor Relations Board* (2nd Circuit), 98 F. 2d 758, 761-2-3;  
*Cupples Co. Manufacturers v. National Labor Relations Board* (8th Circuit), 106 F. 2d 100, 114-116;

*L. Greif & Bro., Inc. v. National Labor Relations Board*  
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*National Labor Relations Board v. Swank Products, Inc.* (3rd Circuit), 108 F. 2d 872, 874-5.

### Conclusion

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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